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No. 01-332

IN THE
Supreme Court of the United States

BOARD OF EDUCATION OF INDEPENDENT SCHOOL DISTRICT NO. 92 OF POTTAWATOMIE COUNTY ET AL.,
Petitioners,

v.

LINDSAY EARLS ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF JEAN BURKETT ET AL. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. A SCHOOL'S AUTHORITY TO ACT *IN LOCO PARENTIS* DOES NOT JUSTIFY A PROGRAM OF SUSPICIONLESS SEARCHES IN THE ABSENCE OF AN ORDER- OR SAFETY-RELATED NEED. 4

II. THE DRUG TESTING POLICY IS UNREASONABLE BECAUSE IT UNDERMINES THE INTEGRITY OF THE PARENT-CHILD RELATIONSHIP. 12

A. Many of the Students Subject to the Policy at Issue Here Have a Reasonable Expectation That Authority Figures Will Not Subject Them to Suspicionless Searches. 14

B. Parents Have a Constitutionally Protected Right To Direct Their Children's Upbringing. 18

CONCLUSION 21

APPENDIX A: List of *Amici Curiae* 1a

TABLE OF AUTHORITIES

CASES

Page(s)

Ambach v. Norwick, 441 U.S. 68 (1979) 10
Andreozzi v. Rubano, 141 A.2d 639 (Conn. 1958) 7
Bethel School District No. 403 v. Fraser, 478 U.S. 675 (1986) 5, 9, 10
Brooks v. East Chambers Consolidated Independent School District, 730 F. Supp. 759 (S.D. Tex. 1989), *aff'd*, 930 F.2d 915 (5th Cir. 1991) 14
Chandler v. Miller, 520 U.S. 305 (1997) 3
City of Indianapolis v. Edmond, 531 U.S. 32 (2000) 3
Earls v. Board of Education, 242 F.3d 1264 (10th Cir.), *cert. granted*, 122 S. Ct. 509 (2001) 15
Farmer v. State, 275 S.E.2d 774 (Ga. Ct. App. 1981) 7
Goss v. Lopez, 419 U.S. 565 (1975) 7
Guirrieri v. Tyson, 24 A.2d 468 (Pa. Super. Ct. 1942) 7
H.L. v. Matheson, 450 U.S. 398 (1981) 19
Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988) 10
Hodgson v. Minnesota, 497 U.S. 417 (1990) 19
Ingraham v. Wright, 430 U.S. 651 (1997) 8
Keyes v. School District No. 1, 413 U.S. 189 (1973) 20
Mozert v. Hawkins County Board of Education, 827 F.2d 1058 (6th Cir. 1987), *cert. denied*, 484 U.S. 1066 (1988) 10
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Parents United for Better Schools, Inc. v. School District of Philadelphia Board of Education, 148 F.3d 260 (3d Cir. 1998) 7
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Phillips v. Johns, 12 Tenn. App. 354, 1930 WL 1707 (Tenn. Ct. App. 1930) 7

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Page(s)

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Santosky v. Kramer, 455 U.S. 745 (1982) 10, 19
Schaill v. Tippecanoe County School Corp., 679 F. Supp. 833 (N.D. Ind.), *aff'd*, 864 F.2d 1309 (7th Cir. 1988) 14
Smith v. W. Va. State Board of Education, 295 S.E.2d 680 (W. Va. 1982) 7
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State ex rel. Gilroy v. Superior Court, 226 P.2d 882 (Wash. 1951) 7
Territory v. Cox, 24 Haw. 461, 1918 WL 1244 (Haw. Terr. 1918) 7
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Troxel v. Granville, 530 U.S. 57 (2000) 19
United States v. Martinez-Fuerte, 428 U.S. 543 (1976) 3
Vernonia School District 47J v. Acton, 515 U.S. 646 (1995) ..... *passim*
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Wisconsin v. Yoder, 406 U.S. 205 (1972) 10, 11, 19

CONSTITUTIONAL & STATUTORY PROVISIONS

U.S. Const. amend. IV 3
Ala. Code § 13A-13-6 12
Md. Code Ann., Educ. § 7-301(c) 12
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TABLE OF AUTHORITIES—Continued

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BRIEF OF AMICI CURIAE

Amici respectfully submit this brief to make two points:

First, the doctrine of *in loco parentis* does not authorize school officials to conduct suspicionless drug tests on all students who engage in extracurricular activities. That common law doctrine traditionally provides for a specific and narrow delegation of a subset of parental authority to school officials—the authority to take necessary steps to protect the safety of the students and to preserve order in the classroom, but not to usurp a parent's right to make childrearing decisions having little bearing on school safety or discipline. The doctrine properly informs an understanding of a student's reasonable expectation of privacy, and was sensibly invoked to support the conclusion in *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995), that drug testing, in the face of open rebellion in the classroom and when necessary to protect the safety of student athletes, did not violate reasonable expectations of privacy. It has no reasonable application, however, to the very different facts of this case.

Second, the institution of suspicionless drug testing, where it cannot be justified as a valid exercise of traditional *in loco parentis* authority, is (a) inconsistent with students' reasonable expectation that they will be treated with dignity and respect by persons in positions of authority; and (b) interferes with the rights of parents to foster relationships with their children based on openness and mutual respect.

INTEREST OF *AMICI CURIAE*[1]

Amici include 19 parents and grandparents of children who attend, have attended, or will attend Tecumseh High

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[1] This brief was authored in its entirety by undersigned counsel for *amici curiae*. No person or entity, other than the named *amici curiae* and their counsel and members, made any monetary contribution to the preparation or submission of this brief. Letters consenting to the filing of this brief are on file with the Clerk of this Court.

School, five parents of children from nearby school districts who fear implementation of a similar mandatory drug testing policy at their children's schools, and one parent who schools his child at home. They vigorously object to the Student Activities Drug Testing Policy ("Policy") implemented by the Petitioners, which requires students in the seventh through twelfth grades in the Tecumseh School District to submit to suspicionless urinalysis drug testing by the school as a condition of participating in a range of extracurricular activities not limited to competitive athletics. *Amici* oppose the Policy because it takes parenting away from the parents; it unfairly targets children who are unlikely to use drugs; it stamps a badge of shame onto children whose parents might wish to approach the issue of drug use without imposing mandatory urinalysis on their children; it unnecessarily forces parents to choose between two parenting strategies they deem essential—encouraging participation in extra-curricular activities and maintaining a parent-child relationship based on trust and respect; it creates an atmosphere of distrust and disrespect at school, and potentially at home; and it usurps parents' authority to make decisions about how their children are raised. These parents disagree with the proposition that the school district is entitled to assault the integrity of the parent-child relationship.

Although the Petitioners point to a community meeting convened by the local Board of Education to seek community input regarding the proposed Policy, *see* Pet. Br. 8, *amici* did not know about that meeting at the time. Instead, *amici* first learned about the Policy when it was imposed on their children, or, in the case of *amici* whose children were not then attending Tecumseh High School, when word of the lawsuit giving rise to the present case spread through their small community. A complete list of *amici* is set forth in Appendix A.

SUMMARY OF ARGUMENT

The Fourth Amendment by its terms prohibits "*unreasonable* searches." U.S. Const. amend. IV. This Court accordingly has held time and again that "the ultimate measure of the constitutionality of a governmental search is 'reasonableness.'" *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652 (1995); *see New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985) (noting that "the underlying command of the Fourth Amendment is always that searches and seizures be reasonable"). While it is true that "what is reasonable depends on the context within which a search takes place," *T.L.O.*, 469 U.S. at 337, a search is "ordinarily unreasonable in the absence of individualized suspicion of wrongdoing," *City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2001); *see Chandler v. Miller*, 520 U.S. 305, 308 (1997); *United States v. Martinez-Fuerte*, 428 U.S. 543, 560 (1976). Indeed, a search must be supported by some degree of individualized suspicion in all but certain "limited circumstances." *Edmond*, 531 U.S. at 37.

In the school context, whether it is reasonable to dispense with the *individualized* suspicion requirement depends on the totality of the circumstances. As this Court has explained, "the legality of a search of a student should depend . . . on the reasonableness, under all the circumstances, of the search." *T.L.O.*, 469 U.S. at 341; *see id.* at 337 ("Although the underlying command of the Fourth Amendment is always that searches and seizures be reasonable, what is reasonable depends on the context within which a search takes place.").

Amici submit that two key points should inform the reasonableness inquiry in this case. *First*, the drug testing at issue in this case is not necessary to protect students from impending physical harm or to prevent classroom disruption. It is certainly true that students' reasonable expectation of privacy at school is reduced to the extent that the school acts as a "guardian and tutor of children entrusted to its care." *Vernonia*, 515 U.S. at 655. But even in this setting, suspi-

cionless searches are impermissible in the absence of a need to protect order and safety in the school environment. Contrary to the Petitioners' contention, the fact that schools act *in loco parentis* with respect to their students does not justify—in the absence of concerns about physical safety or disruption to which the *in loco parentis* doctrine has historically been addressed—dispensing with the individualized *suspicion* requirement when evaluating Fourth Amendment searches in the school context.

Second, a school's constitutional obligation to exercise its authority to act *in loco parentis* in a reasonable fashion includes an obligation not to act in a way that unduly intrudes upon the parent-child relationship. Many parents, including *amici*, prefer to approach the issue of drug use with their children in an environment of trust and respect. For a school to impose a wholesale policy of suspicionless drug tests on students who are not engaged in activities (such as competitive sports) that involve enhanced safety risks would be to place an unjustifiably exacting toll on the integrity of the relationship between those students and their parents. Indeed, it would sabotage parents' reasonable attempts to base their relationship with their children on principles of trust and open communication.

ARGUMENT

I. A SCHOOL'S AUTHORITY TO ACT *IN LOCO PARENTIS* DOES NOT JUSTIFY A PROGRAM OF SUSPICIONLESS SEARCHES IN THE ABSENCE OF AN ORDER- OR SAFETY-RELATED NEED.

In evaluating the drug testing policy at issue in *Vernonia*, this Court observed that "Fourth Amendment rights . . . are different in public schools than elsewhere," 515 U.S. at 656, and that "'students within the school environment have a lesser expectation of privacy than members of the population generally,'" *id.* at 657 (quoting *T.L.O.*, 469 U.S. at 348 (Powell, J., concurring)). A principal reason for this diminished privacy expectation, the Court reasoned, is the "custo-

dial and tutelary" authority that schools typically exercise over their students, which "permit[s] a degree of supervision and control that could not be exercised over free adults." *Id.* at 655. That authority, in turn, derives in part from the principle that "schools stand *in loco parentis* over the children entrusted to them." *Id.* at 654. Just as children have diminished reasonable expectations of privacy from parents' intrusions into their lives, students' reasonable expectation of privacy is lessened at school, in circumstances where school authorities act *in loco parentis* and assume "responsibilities . . . as guardian and tutor of [the] children entrusted to [their] care." *Id.* at 665.

The Petitioners herein seize on this language in *Vernonia* (Pet. Br. 26, 33-36), contending that the case stands for the proposition that students' reasonable expectation of privacy at school is so diminished that schools may engage in wholesale suspicionless searches without regard to the presence or absence of the very safety-related concerns on which this Court in *Vernonia* appears to have relied—the interest in protecting student athletes from the increased risks associated with drug use among students who engage in competitive athletic activities. The Petitioners' argument, however, fundamentally misunderstands both what it means for a school to act *in loco parentis* and the consequences of that historic authority on students' privacy expectations in school.

As this Court has observed, while public school officials exercise coercive state authority and thus remain state actors within the meaning of the Fourteenth Amendment, "for many purposes 'school authorities ac[t] *in loco parentis*.'" *Vernonia*, 515 U.S. at 655 (quoting *Bethel Sch. Dist. No. 43 v. Fraser*, 478 U.S. 675, 684 (1986)). One who acts *in loco parentis* acts "[i]n the place of a parent; instead of a parent . . . ." *Black's Law Dictionary* 787 (6th ed. 1990). The Petitioners, however, grossly overestimate the range of purposes for which a school official may legitimately act *in loco parentis*. Indeed, examination of the origins of the principle reveals

that the Petitioners' invocation of *in loco parentis* to justify suspicionless drug testing in the absence of an identifiable threat to order in the school environment or to students' physical safety (such as this Court emphasized in *Vernonia*) would untether the doctrine from its traditional common law moorings.

At common law, the principle of *in loco parentis* was understood as a limited delegation of parental authority for the specific purpose of preserving the order and discipline of the school environment. As Blackstone defined the principle, a parent

> may . . . delegate *part* of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then *in loco parentis*, and has such a *portion* of the power of the parent committed to his charge, viz. *that of restraint and correction*, as may be necessary to answer the purposes for which he is employed.

1 W. Blackstone, *Commentaries on the Laws of England* 453 (1769) (emphases added), *reprinted in* 1 Blackstone, *Commentaries on the Law of England in Four Books* 427-28 (William Draper Lewis ed., 1897); *see Vernonia*, 515 U.S. at 655 (quoting Blackstone).

This delegation conveys to school officials only a fraction of parental authority and only for the specific purpose of preserving order and safety. A school's *in loco parentis* authority is not a generalized quasi-parental right empowering the school to make fundamental choices regarding a child's rearing. Those decisions have always belonged to the parent. The principle of *in loco parentis* has never given schools blanket authority to upset them.

Rather, the common law *in loco parentis* doctrine has historically been understood to be a specific and narrow doctrine, empowering school officials to make decisions to preserve school order and discipline to the extent necessary to

create a safe learning environment for the students. *Farmer v. State*, 275 S.E.2d 774, 775 (Ga. Ct. App. 1981) (a "school official stands *in loco parentis*" and "must be allowed reasonable bounds for the preservation of order and discipline") (quoting *State v. Young*, 216 S.E.2d 586 (Ga. 1975) (concurring opinion)); *State ex rel. Gilroy v. Superior Court*, 226 P.2d 882, 886 (Wash. 1951) ("Schoolteachers, at least for purposes of discipline, stand *in loco parentis* . . . ."); *Phillips v. Johns*, 12 Tenn. App. 354, 1930 WL 1707, at *3 (1930) (finding that search of a child was outside the scope of teacher's *in loco parentis* power, because it was not "necessary to educate him or her and to preserve order necessary to the carrying on of the same").[2] In the absence of a need related to the safety or order of the educational environment (such as the need this Court emphasized in *Vernonia*), the

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[2] *See also, e.g., Watkins Glen Central Sch. Dist. v. National Union Fire Ins. Co.*, 732 N.Y.S.2d 70, 74 (App. Div. 2001) ("While they are not insurers of the safety of their students, schools, acting *in loco parentis*, are charged with the duty of adequately supervising their students."); *Andreozzi v. Rubano*, 141 A.2d 639, 641 (Conn. 1958) ("A teacher stands *in loco parentis* toward a pupil. He must maintain discipline, and if a pupil disobeys his orders it is his duty to use reasonable means to compel compliance."); *Guirrieri v. Tyson*, 24 A.2d 468, 469 (Pa. Super. Ct. 1942) ("These teachers stand *in loco parentis* to the child . . . . Under the delegated parental authority implied from the relationship of teacher and pupil, a teacher may inflict reasonable corporal punishment on a pupil to enforce discipline . . . ."); *Territory v. Cox*, 24 Haw. 461, 1918 WL 1244, at *3 (Haw. Terr. 1918) (noting that *in loco parentis* gives schoolmaster "the right to inflict reasonable corporal punishment upon his pupil for such misbehavior as has a direct and immediate tendency to injure the school or to subvert the master's authority"); *see also Parents United for Better Schools, Inc. v. School Dist. of Philadelphia Bd. of Educ.*, 148 F.3d 260, 273 n.7 (3d Cir. 1998) (in approving condom distribution program, noting that "the common law concept of *in loco parentis* authority" was not implicated, because "[h]ere, the Board is acting as educator, not *in loco parentis*"); *Smith v. W. Va. State Bd. of Educ.*, 295 S.E.2d 680, 685 (W. Va. 1982) ("Even though the *in loco parentis* doctrine covers more than the discipline of school children, it is not without constitutional limitations.") (citing *Goss v. Lopez*, 419 U.S. 565 (1975); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969)).

authority to make fundamental decisions regarding a child's rearing is *not* delegated to school officials—that authority remains with the parent. For this reason, the common law understanding of *in loco parentis* cannot be invoked to justify the suspicionless search at issue here.

This Court's treatment of the *in loco parentis* doctrine generally accords with this accepted common law understanding. For example, in *Ingraham v. Wright*, 430 U.S. 651 (1977), this Court held that corporal punishment in schools without prior notice and hearing did not violate the Constitution. The Court reasoned that the punishment was "reasonably necessary 'for the proper education of the child and for the maintenance of group discipline.'" *Id.* at 662 (quoting 1 Fowler Vincent Harper & Fleming James, Jr., *Law of Torts* § 3.20, at 292 (1956)). That authority is derived from the core aspects of the *in loco parentis* power—the need to maintain an orderly educational environment and to discipline students—not an authority to stand in the parents' shoes on a wholesale basis.[3]

Similarly, this Court's decision in *T.L.O.*, permitting the search of a student's purse without probable cause, relied expressly on the school's unique need to maintain order. The Court emphasized that "the reasonableness standard should ensure that the interests of students will be invaded no more than is necessary to achieve the legitimate end of preserving order in the schools." 469 U.S. at 343; *see also id.* at 384 (Stevens, J., concurring in part and dissenting in part) ("Because this conduct was neither unlawful nor significantly disruptive of school order or the educational process, the invasion of privacy associated with the forcible opening of T.L.O.'s purse was entirely unjustified at its inception."); *id.* at 363 (Brennan, J., concurring in part and dissenting in part) (referring to goal of "maintaining an effective educational setting").

[3] Even in the context of preserving order—the core of the *in loco parentis* delegation—school officials of course remain state actors for constitutional purposes: "In carrying out searches and other disciplinary functions pursuant to such policies, school officials act as representatives of the State, not merely as surrogates for the parents, and they cannot claim the parents' immunity from the strictures of the Fourth Amendment." *T.L.O.*, 469 U.S. at 336-67.

At most, therefore, the *in loco parentis* doctrine authorizes school officials to take actions necessary to preserve order in the schools and to protect students from physical harm, such as the dangers of drug use among athletes engaged in dangerous physical activity. The Policy at issue here, in sharp contrast, is designed to control the behavior, both inside and outside the school environment, of a far larger proportion of the student body not engaged in such dangerous activities. The authority to make those decisions, however, belongs to and remains with the parents. Where order and safety are not threatened, *in loco parentis* does not expand the authority of school officials, and, by the same token, does not diminish a student's reasonable expectation of privacy.

It is true that in *Vernonia*, this Court indicated that schools "for many purposes" act *in loco parentis* with the power to "inculcate the habits and manners of civility," 515 U.S. at 655 (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 684, 681 (1986)). And in *Fraser*, the Court invoked *in loco parentis* authority as a reason a school official might seek to protect minors from vulgar and offensive language. 478 U.S. at 684. *Fraser*'s invocation of *in loco parentis*, however, was far from necessary to the holding in the case, and in fact was little more than surplusage. Indeed, *Fraser*'s reference to *in loco parentis* is more confusing than clarifying, as the school authority at issue in that case stemmed from general state interests and not common law delegation specific to the needs of schools. Rather than a broad right of the school official to stand in the place of the parent to establish values and standards of behavior, the *Fraser* Court was relying on the school officials' right to "'inculcat[e] fundamental values necessary to the maintenance of a

democratic political system.'" 478 U.S. at 681 (quoting *Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979)). This includes schools' right to determine their own curriculum, *see Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 278-79 (1988); to keep students from engaging in school-sponsored speech that intrudes on the sensitivities of other students, *see Fraser*, 478 U.S. at 682; to keep schools from appearing as if they support certain political viewpoints through school-sponsored publications, *see Hazelwood*, 484 U.S. at 266-67; and to "[t]each[] students about complex and controversial social and moral issues," *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058, 1071 (6th Cir. 1987), *cert. denied*, 484 U.S. 1066 (1988).

This power of school authorities is more aptly characterized as the power of the state to act as *parens patriae*, "in preserving and promoting the welfare of the child" *Santosky v. Kramer*, 455 U.S. 745, 766 (1982). That power, a component of the state's police power, reflects the state's authority to direct children to accomplish state interests, for example, the interest in educating its citizenry, notwithstanding any contrary wishes of their parents. Thus, the state has invoked this authority to argue for compulsory education despite parents' religion-based wishes to the contrary, *see Wisconsin v. Yoder*, 406 U.S. 205, 229 (1972); to argue for a right to help parents admit their minor children to mental hospitals, *see Parham v. J.R.*, 442 U.S. 584, 605 (1979); and to argue for their right to enforce child labor laws, *see Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). But when a parent's fundamental constitutional right to direct the upbringing of his or her child is genuinely at stake, a state—when it is exercising this police power, and cannot be said to invoke an additional delegated *in loco parentis* authority—must demonstrate a compelling interest in order to override a parent's contrary direction.[4] Thus, for example, the parents' rights in

[4] Commentators have long criticized the invocation of *in loco parentis* in evaluating the scope of a school's general power as a state actor:

> One of the things that makes *in loco parentis* such an erroneous phrase in this context is precisely the absence of a genuinely parental protective concern for the student who is threatened with the school's power. It is presumably a characteristic of the use of parental force against a child that the force is tempered by understanding and love based on a close, intimate, and permanent child-parent relationship. What so many of the courts persist in talking about as a parental relationship between school and student is really a law enforcement relationship in which the general student society is protected from the harms of anti-social conduct.

Wayne R. LaFave, 4 *Search & Seizure* § 10.11(a) (3d ed. 2002) (quoting William G. Buss, *The Fourth Amendment and Searches of Students in Public Schools*, 59 Iowa L. Rev. 739, 768 (1974)).

Yoder could not be overridden by the general invocation of government authority in part because it was "not [a case] in which any harm to the physical or mental health of the child or the public safety, peace, order, or welfare has been demonstrated or may be properly inferred." 406 U.S. at 230. Accordingly, where the only font of state authority is its power to act as *parens patriae* under the state's plenary police power, that authority by itself does not warrant dispensing with the standard Fourth Amendment requirement of individualized suspicion.

This distinction between the principle of *in loco parentis*—a narrow delegation of parental authority to the school for the purpose of protecting safety and maintaining order—and the broader doctrine of *parens patriae*—a state authority to act contrary to a parent's wishes, and even to override fundamental choices regarding childrearing when justified by a compelling interest—accords with traditional limits on a school's authority. Specifically, the scope of a school's authority is derived from, and premised on, its duties. Parents, not schools, are responsible for ensuring that children are safe or well-behaved when they are outside the school's custodial control. Indeed, even while their children are in school, parents can be held liable or even criminally respon-

sible for their children's actions; can be held responsible for failure properly to supervise their children; and can be held responsible if their children fail to arrive at school at all. *See, e.g.*, Ala. Code § 13A-13-6 (assigning guilt to a parent who "fails to exercise reasonable diligence in the control of such child to prevent him or her from becoming . . . a 'delinquent child'"); Md. Code Ann., Educ. § 7-301(c) (holding parents strictly liable when student is truant); Tenn. Code Ann. § 39-17-1312 (punishing "inaction by parents or guardians of minors illegally possessing a firearm"). Accordingly, in the absence of threat to the safety of the student body or the need to maintain order in the classroom, students maintain a reasonable expectation that they will not be subject to suspicionless searches designed to control their behavior more generally.

In light of these principles, the Court of Appeals properly distinguished this case from *Vernonia*. This Court found the drug testing in *Vernonia* reasonable because "'strict adherence to the requirement that searches be based on probable cause' would undercut 'the substantial need of teachers and administrators for freedom to maintain order in the schools.'" 515 U.S. at 653 (quoting *T.L.O.*, 469 U.S. at 340, 341). Here, as the Court of Appeals noted, that substantial need to maintain order—the foundation of the *in loco parentis* authority—is absent. Accordingly, the students who are subject to the policy at issue here maintain a reasonable expectation of privacy that is violated when they are subject to suspicionless drug testing.

II. THE DRUG TESTING POLICY IS UNREASONABLE BECAUSE IT UNDERMINES THE INTEGRITY OF THE PARENT-CHILD RELATIONSHIP.

Vernonia instructs that in determining whether a search by school officials is reasonable, "the relevant question is whether the search is one that a reasonable guardian and tutor might undertake." 515 U.S. at 665. In this context, a school's obligation to act reasonably includes an obligation to act in such a manner that does not unduly intrude on the

parent-child relationship. Many parents, including *amici*, choose to develop relationships with their children premised on dignity and respect. To require children who are not engaged in activities involving enhanced safety risks to submit to suspicionless drug testing would undermine those chosen values by signaling to children that they do not deserve such dignity and respect. Thus, such testing not only violates the students' reasonable expectations of privacy, but also profoundly interferes with the ability of *amici* to raise their children in accordance with their own values. In the absence of particular circumstances requiring more intrusive state action to preserve order and safety in schools, the decision to drug test children without individualized suspicion belongs in the home, where courts have long recognized the sanctity of the parent-child relationship. Within that relationship, *amici* reject blanket drug testing because it destroys the trust and open communication that parents strive so hard to foster with their children. It would be unreasonable for a school to compromise that respect and dignity except where the preservation of school safety and order demand it.

The Policy's costs—infringement on the private sphere of parental decisionmaking and damage to the parent-child bond—flow from any effectively mandatory school drug testing policy not based on individualized suspicion. Although not specifically delineated in *Vernonia*, any constitutional assessment of such a program must take these costs into account because "the legality of a search of a student should depend . . . on the reasonableness, *under all the circumstances*, of the search." *T.L.O.*, 469 U.S. at 341 (emphasis added). The Policy's collateral damage to parental authority and the parent-child relationship is a consequence of constitutional significance. In the contextualized reasonableness inquiry that the Fourth Amendment requires, *see id.* at 337, these costs, when balanced against the government's interest in the absence of any special need, render the Policy unreasonable and therefore in violation of the Fourth Amendment.

A. Many of the Students Subject to the Policy at Issue Here Have a Reasonable Expectation That Authority Figures Will Not Subject Them to Suspicionless Searches.

Because applicable Fourth Amendment analysis focuses on whether a government action interferes with reasonable expectations of privacy, it is appropriate to examine whether students who are subject to the Petitioner's Policy expect authority figures to subject them to suspicionless searches. *Amici* contend that the students subject to this Policy have formed reasonable expectations, based on the respect *amici* show their children, that they will not be subject to such treatment.

As parents of children who are, have been, or will be affected by blanket, suspicionless drug testing, *amici* submit that the Policy imposes unreasonable burdens on the parent-child relationship. In fact, the Policy causes great harm to the parent-child bond by breaking down custodial relationships based on free communication, trust, and respect and by stamping students who participate in extracurricular activities—students who are *less* likely to take drugs[5]—with a

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5 *See Brooks v. East Chambers Consol. Indep. Sch. Dist.*, 730 F. Supp. 759, 764 (S.D. Tex. 1989) ("[L]ogic would dictate that students who participate in athletics and other extra-curricular activities are, in fact, less likely to use drugs . . . ."), *aff'd*, 930 F.2d 915 (5th Cir. 1991); *Schaill v. Tippecanoe County Sch. Corp.*, 679 F. Supp. 833, 843 (N.D. Ind.), *aff'd*, 864 F.2d 1309 (7th Cir. 1988) (citing sports psychologist's testimony that "research indicated that students who engage in extracurricular activities such as sports, are less likely to use drugs than the general school population"); National Institute on Out-of-School Time, Wellesley College, *Fact Sheet on School-Age Children's Out-of-School Time*, *available at* http://www.wellesley.edu/WCW/CRW/SAC/factsht.html (visited Feb. 4, 2002) ("Students who spend 1-4 hours per week in extracurricular activities are 49% less likely to use drugs . . . than students who do not participate in extracurricular activities."); *If Sports Build Character, Why Test High-School Athletes for Drugs?*, L.A. Times, July 3, 1995, at 5 (quoting school principal saying "Our athletes are the least likely to be involved in substance abuse problems, quite frankly, because

badge of shame. As the Court of Appeals noted, "the Policy, from a safety perspective, tests both too many students and too few. In essence, it too often simply tests the wrong students." *Earls v. Board of Educ.*, 242 F.3d 1264, 1277 (10th Cir. 2001) (footnote omitted).

Many parents approach the task of child-rearing by encouraging trust and individual responsibility for their children. This kind of relationship is based on open communication between the parents and the child. The Tecumseh High School drug testing Policy directly interferes with such relationships. Drug counselors, pediatricians and psychology professors have indicated that proactive drug testing tends to interfere with a trust-based relationship between a parent and child. *See, e.g.*, Sean Davidson, *Troubled Kids, Bad Science?*, Globe and Mail (Toronto), July 17, 2001, at R6; Amanda Vogt, *Drug Test Kits Offer Answer to Worried Parents But Critics Still Question*[] *Its Use*, Chi. Trib., Sept. 12, 2001, at 3; American Academy of Pediatrics Committee on Substance Abuse, *Testing for Drugs of Abuse in Children and Adolescents*, 98 Pediatrics 305, 305 (1996). By subjecting a child to a drug test, a parent (or someone acting in the place of a parent) creates an atmosphere of mistrust and encourages deception. *See* Vogt, *supra*, at 3 ("The test creates the opportunity for deception and distrust, which creates the opportunity to erode communication between parent and child.") (quoting Peter Palanca, psychiatrist and president of Hazelden Chicago, a drug abuse treatment center). As a result, the child is likely to feel as though she has not been treated fairly, which in turn will interfere with effective communication. *See* Davidson, *supra*, at R6; *see also Drug Test Kits Bad for Families*, Daily Telegraph (Austr.), May

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they are engaged for much longer parts of the day."); Lee Shilts, *The Relationship of Early Adolescent Substance Use to Extracurricular Activities, Peer Influence, & Personal Attitudes*, 26 Adolescence 613, 615-16 (1991) ("nonusing adolescents . . . tended to be highly involved in extracurricular activities").

29, 2001, at 9 (discussing tests to detect drug residue on surfaces as something that could alienate teenagers, lead to confrontation with parents, and exhibit a lack of trust).

The students who are subject to this Policy have formed reasonable expectations that they will not be treated in such a manner. Indeed, it is widely believed that introducing this sort of mistrust into a child's life is inconsistent with a parent-child relationship based on openness and mutual respect. *See* Claire Martin, *Drug Deterrent? Use of Home Testing Kits May Ruin Trust, Experts Say*, Denv. Post, Nov. 7, 1999, at F11 (drug testing "would certainly break down the trust between parent and child") (quoting DARE Colorado Executive Director Russ Ahrens); *cf.* Brendan January, *Alcohol Kit Puts Teens to the Test*, Star-Ledger (Newark, N.J.), Jan. 24, 2001, at 029 (citing a clinical psychology professor who indicated that an alcohol test may be seen by the child as a breach of trust). It is thus far from clear that drug testing is something that reasonable parents would undertake, particularly when they do not even suspect their children of drug use. Indeed, students' diminished trust both of their parents and of their school may actually *increase* the likelihood that they will turn to drug use without consulting a custodial adult.

There is evidence that suspicionless drug testing is harmful to children in other ways as well. For example, the threat of testing may induce adolescents using marijuana to switch to more potent drugs that are more difficult to detect through urine tests. *See* Davidson, *supra*, at R6 (citing substance abuse center source who indicated that drug testing will induce kids to switch to harder drugs that are less detectible, such as LSD, cocaine, and heroin). In addition, testing students who engage in extra-curricular activities may discourage students from participating in such activities,[6] which in

[6] Students may be discouraged for a number of reasons. For example, they may fear detection of actual illegal drug usage, they may wish to protect their privacy, or they may be embarrassed by the drug testing procedure.

turn may make them more likely to abuse alcohol or other drugs.[7]

Perhaps most important, the institution of mandatory drug testing in schools sends a negative message to children about their schools, their relationship with their parents (who must sign consent forms to allow them to participate in certain extracurricular activities at Tecumseh High), and their trustworthiness.

Effective alternatives to mandatory testing are available, the most obvious being testing based on individualized suspicion. The American Academy of Pediatrics Committee on Substance Abuse has recommended against mass suspicionless screening for drug use as a prerequisite to participation in extra-curricular activities, which it found unlikely to detect most drug users. *See* American Academy of Pediatrics Committee on Substance Abuse, *supra*, at 305-06. Instead, the Academy recommended a response that depends, first, on identifying children suspected of drug use and then referring them for a "comprehensive evaluation by a qualified health care professional." *Id.* at 307. Thus, even if students' safety or school discipline were implicated, or even if the school's interest in protecting its own public image were sufficient to permit some kind of drug testing program (as the Petitioners appear to suggest, *see* Pet. Br. 46 n.27), the Policy at issue in this case is not a reasonable means of achieving those ends.

[7] *See* Jeanne E. Jenkins, *The Influence of Peer Affiliation & Student Activities on Adolescent Drug Involvement*, 31 Adolescence 297, 304 (1996) ("Involvement in school, as indicated through . . . extracurricular involvement do[es] show a relationship to decreased . . . drug use."); Royer Cook, *The Alternatives Approach Revisited: A Biopsychological Model and Guidelines Application*, 20 Int'l J. of Addictions 1399, 1399 (1985) ("[I]ndividuals provided with healthful, nonchemical ways of gaining rewards and pleasures will be less likely to engage in drug or alcohol abuse.") (abstract).

Testing based on reasonable suspicion would be far more likely to detect students using drugs, and far less likely to inflict the harms *amici* fear. Where individualized suspicion exists, the reasonableness inquiry would produce a result different from the one here, and students could not reasonably expect that they would not be subject to search on that basis. But in light of the environment of open communication, trust, and respect that parents typically seek to foster with their children, the wholesale implementation of suspicionless searches plainly violates reasonable expectations of privacy that students will have formed.

B. Parents Have a Constitutionally Protected Right To Direct Their Children's Upbringing.

The Policy in this case usurps parents' rights to determine whether drug testing, without individualized suspicion, is an appropriate component of child rearing when children are not engaged in heightened-risk activities. In answering the key question identified in *Vernonia*—whether a reasonable guardian and tutor would undertake the search at issue, *see* 515 U.S. at 665—it is important to keep in mind "the traditional presumption that the parents act in the best interests of their child." *Parham v. J.R.*, 442 U.S. 584, 604 (1979); *id.* at 602 ("historically [the law] has recognized that natural bonds of affection lead parents to act in the best interests of their children"). Indeed, the *Vernonia* Court took care to note, in upholding the policy at issue there, that "the primary guardians of Vernonia's schoolchildren appear to agree" with the school that suspicionless drug testing of athletes to promote safety is a reasonable action. 515 U.S. at 665; *see also id.* (recognizing parents' unanimous approval of the policy at issue in that case).

The respect paid by the *Vernonia* Court to the parental prerogative to make fundamental decisions regarding the rearing of one's child was well founded. As this Court has observed, parents' interest in the care, custody, and control of their children is "perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality opinion); *see also Santosky v. Kramer*, 455 U.S. 745, 774 (1982) (recognizing that "the interest of parents in their relationship with their children is sufficiently fundamental to come within the finite class of liberty interests protected by the Fourteenth Amendment") (Rehnquist, J., dissenting); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (acknowledging "that the relationship between parent and child is constitutionally protected"); *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) (observing that "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations"). Accordingly, except in rare instances of parental unfitness, there will "normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *Troxel*, 530 U.S. at 68-69.

Indeed, this Court has relied on the constitutional significance of parental rights in insulating numerous aspects of childrearing from state interference. *See, e.g., H.L. v. Matheson*, 450 U.S. 398, 410 (1981) (plurality opinion) (upholding requirement that minor notify parent before seeking abortion); *Hodgson v. Minnesota*, 497 U.S. 417, 446-54 (1990) (Stevens, J., joined by O'Connor, J.) (same); *Troxel*, 530 U.S. at 75 (denying visitation rights to grandparents when parents object); *Wisconsin v. Yoder*, 406 U.S. 205, 232-34 (1972) (permitting Amish parents to exempt their children from state compulsory education laws). Because of the fundamental nature of this right, only significant interests can outweigh it. *See, e.g., Parham*, 442 U.S. at 604 (holding that minor's interest in liberty outweighed parent's childrearing rights when parent sought to commit child to mental institution).

Accordingly, in cases where, as here, a school intrudes upon students' liberty and privacy interests in a manner at odds with the preferences of the students' parents, the intrusion implicates not only the students' constitutional interests but also the parents' fundamental constitutional right to decide what is in the their children's best interest. And where the intrusion comes by way of suspicionless drug searches of students whose parents prefer to address issues of drug use in an environment of openness and trust, it undermines the right of parents to cultivate the parent-child relationship as they see fit. *See Keyes v. School Dist. No. 1*, 413 U.S. 189, 247 (1973) (Powell, J., concurring in part and dissenting in part) ("[T]he interest of the parent in the enhanced . . . parent-child communication . . . ought not to be suppressed by force of law."); *Random Testing in Florida School District Spurs National Debate*, 9 Alcoholism & Drug Abuse Week 1 (Oct. 6, 1997) (citing prevention group director saying that "many pediatricians are slow to test children and adolescents for drug use, not wanting to intrude on the parent-child relationship").

The point here is not that a reasonable parent would necessarily object in all cases to a school's suspicionless drug testing of her child. Rather, the point is that many reasonable parents *do* justifiably object to such testing where the school is not responding to a special need to preserve order and safety, and that a system of mandatory drug testing denies parents the power to decide whether their children ought to be subject to such testing. In the absence of individualized suspicion or an acute need to protect school safety and order, such an intrusion on parental prerogative is manifestly unreasonable.

CONCLUSION

The Petitioners have stepped outside the bounds of their delegated custodial power by instituting this mandatory, suspicionless, mass drug-testing Policy without demonstrating a compelling need for order or safety. Accordingly, in addition to the obvious intrusion on Tecumseh High School students' undiminished, reasonable expectations of privacy, the Petitioners have interfered with the integrity of the parent-child relationship and the fundamental constitutional right of parents to make choices about how to raise their children. The Policy fails the reasonableness requirement of the Fourth Amendment. For the reasons stated in this brief, and the reasons advanced by the Respondents, the Court should affirm the decision of the Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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APPENDIX A

LIST OF AMICI CURIAE

1. Jean Burkett
   Mother of pre-high school children in a nearby school district
2. Marc and Kim Chapman
   Parents of pre-high school children in a nearby school district
3. Thomas Charles Chapo and Wanda Chapo
   Parents of children who graduated from Tecumseh High School who participated in Pom Pon and athletics
4. John C. Earls, Jr.
   Grandfather of Lindsay and Lacey Earls
5. Larry and Tammy Earls
   Parents of children who will attend Tecumseh High School
6. John Paul Gokey, Sr. and Judy Rene Gokey
   Parents of daughter who graduated from Tecumseh High School who participated in choir and color guard and son who attends Tecumseh High School and participates in Future Farmers of America
7. Sharon Hughes
   Mother of children in a nearby school district
8. Karen S. and Mark W. Jones
   Parents of two daughters who attend Tecumseh High School and participate in Future Farmers of America
9. Blaine Morris
   Father of pre-high school child
10. Hollis M. Morris
    Father of daughter who is being schooled at home

11. Randall and Jacqueline O'Rorke
Parents of son who graduated from Tecumseh High School and participated in Future Farmers of America

12. Jack W. and Rachel L. Reece
Parents of children who graduated from Tecumseh High School and grandparents of children who go to Tecumseh High School and participate in Future Farmers of America

13. Jackie and Tammy Dail Reece
Parents of daughter who will attend Tecumseh High School

14. Harvey and Wendy Reynolds
Parents of children who will attend Tecumseh High School

15. Mary Pinson Thomas
Mother of son who graduated from Tecumseh High School and participated in Future Farmers of America

16. Sharon R. Trammell
Mother of daughter who graduated from Tecumseh High School

36
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